IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs May 6, 2008

GARY WALLACE v. STATE OF TENNESSEE

Appeal from the Circuit Court for Madison County
No. 85-78 Roy B. Morgan, Judge

No. W2007-01949-CCA-R3-CO - Filed July 2, 2008

The Appellant, Gary Wallace, appeals from the order of the Madison County Circuit Court dismissing the motion to vacate sentence and judgment he filed more than twenty-two years after his conviction. In the motion, he asserts that his sentence should be vacated because it was improperly enhanced in violation of the United States Supreme Court's holding in Blakely v. Washington, 542 U.S. 296 (2004). Following our review, we conclude that Blakely cannot be retroactively applied and affirm the circuit court's order of dismissal.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., J., and DAVID G. HAYES, SR.J., joined.

Gary Wallace, Whiteville, Tennessee, Pro Se.

Robert E. Cooper, Jr., Attorney General and Reporter; Lacy Wilber, Assistant Attorney General; Jerry Woodall, District Attorney General; and Al Earls, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

The Appellant was convicted of armed robbery on April 29, 1985, and ordered to serve a life sentence in the Department of Correction. See State v. Gary Wallace, 1985 WL 4145, at *1 (Tenn. Crim. App., Jackson, Dec. 4, 1985), perm. to appeal denied, (Tenn. Mar. 3, 1986). His conviction and sentence were affirmed on direct appeal, see id. at *2, and his petition for post-conviction relief was denied, see State v. Gary Wallace, No. 02C01-9404-CC-00084, 1995 WL 120276 (Tenn. Crim. App., Jackson, Mar. 22, 1995), perm. to appeal denied, (Tenn. July 3, 1995). Subsequently, he filed at least two meritless petitions for habeas corpus relief. See Gary Wallace v. State, No. M2004-01534-CCA-R3-HC, 2005 WL 639136 (Tenn. Crim. App., Nashville, Mar. 17, 2005); Gary

Wallace v. Kevin Myers, Warden, No. M2003-02758-CCA-R3-HC, 2004 WL 2346143 (Tenn. Crim. App., Nashville, Oct. 19, 2004).

On July 19, 2007, he filed a "Motion to Vacate Sentence and Judgment Based on a 'Void' Conviction." In the motion, he asserted that his sentence was void because his Sixth Amendment Right to a jury trial was violated when the sentencing court enhanced his sentence above the minimum after unilaterally finding a statutory enhancement factor was applicable in his case.[1] His argument is based on the United States Supreme Court's holdings in Blakely v. Washington, 542 U.S. 296 (2004), and Cunningham v. California, 549 U.S. 270 (2007) (holding that the Sixth Amendment's jury-trial guarantee prohibits judges from imposing a sentence above the maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant). See also generally State v. Gomez, 239 S.W.3d 733 (Tenn. 2007).

The circuit court dismissed his "motion," finding that if it were treated as a petition for post-conviction relief, it was time-barred, and if it were treated as a petition for habeas corpus relief, it was filed in the wrong county. Further, the circuit court ruled that the Appellant was not entitled to relief under Blakely or Cunningham, and that because these decisions did not render the Defendant's judgment void, he was not entitled to habeas corpus relief.

ANALYSIS

We agree with the circuit court. If the Appellant's motion is treated as a petition for post-conviction relief, it is time barred. See Tenn. Code Ann. § 40-30-102 (1986) (providing that the Appellant had three years from the date our supreme court denied his application for appeal to file a petition for post-conviction relief). If treated as a habeas corpus petition, his motion must also be dismissed because he filed it in the wrong county: the Appellant filed his motion in the Madison County Circuit Court, but he is incarcerated in Hardeman County, closer in point of distance to the Hardeman County Circuit Court, and in the motion he stated no reason for not filing in Hardeman County. See Tenn. Code Ann. § 29-21-105 (petitions for habeas corpus relief "should be made to the court or judge most convenient in point of distance to the applicant, unless a sufficient reason be given in the petition for not applying to such court or judge").

However, in the interest of judicial economy, we will also address the Appellant's argument on the merits in anticipation of the possibility of his re-filing the motion as a petition for habeas corpus relief in the proper court. The Appellant's motion lacks merit because this Court has repeatedly held that Blakely v. Washington and its progeny did not create a new rule of law which was entitled to retroactive application when raised within the context of a habeas corpus proceeding. See e.g., Glen Cook v. State, No. W2006-01514-CCA-R3-PC, 2008 WL 821532, at *10 (Tenn. Crim. App., Jackson, Mar. 27, 2008); Billy Merle Meeks v. Ricky J. Bell, Warden, No.

[1] According to the Appellant's motion, his sentence was elevated above the presumptively applicable minimum because the trial court unilaterally found by a preponderance of the evidence that he had "a previous history of unwillingness to comply with the conditions of a sentence involving release in the community."

M2005-00626-CCA-R3-HC, 2007 WL 4116486, at *7–8 (Tenn. Crim. App., Nashville, Apr. 7, 2008).

Conclusion

Based on the foregoing, we affirm the Madison County Circuit Court's order dismissing the Appellant's motion.

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DAVID H. WELLES, JUDGE